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IN THE

Supreme Court of the United States

October Term 1963
No. 5, Original

UNITED STATES OF AMERICA,

Plaintiff,

vs.

STATE OF CALIFORNIA,
CARL WHITSON, a Long Beach, California Taxpayer,

Amicus Curiae.

BRIEF OF AMICUS CURIAE

PRELIMINARY STATEMENT

On May 18, 1964, this Court granted leave for Carl Whitson, a Long Beach, California Taxpayer, to file amicus curiae brief on behalf of the taxpayers and citizens of Long Beach, California.

The City of Long Beach, California, had been notified and requested to file such a brief, but it declined, using the reason that it feared if it did so the State of California would take all the oil and gas revenues from the city — a fear not unfounded in view of the recent actions by the State taking 85% of the oil income and all dry gas revenues from Long Beach.

The City of Long Beach, California, is an interested party as it was given about twenty thousand (20,000)

acres of oil and gas bearing offshore submerged lands within the city limits, under the terms of the Submerged Lands Act. (43 U.S.C. Sec. 1301, et seq.) This tract of land has heretofore yielded oil and gas income in the sum of about One Billion Dollars $1,000,000,000.00); and it is estimated that about Five Billion Dollars ($5,000,000,000.00) more petroleum products can and likely will be produced and sold from such lands, in the next thirty-five years.

QUESTIONS

I

What is the "ordinary low water mark" or low tide line of lands within the City of Long Beach, California?

II

What kind of title and use of funds did Long Beach, California, receive under the terms of the Submerged Lands Act?

III

Is the State of California powerless to take the lands or funds from Long Beach?

ARGUMENT OR DISCUSSION OF ISSUES

QUESTION NO. I

Low Tide Line

The United States has filed supplemental complaint claiming that the low tide line should be fixed as the actual shore line, excluding any man-made change in the shore line, such as wharfs, docks or breakwaters. Said in another way this would be the shore line as

it existed in 1850 when California joined the Union, plus any natural change thereto.

It is urged on behalf of the Taxpayers of Long Beach that the same rule of law as claimed by the United States should prevail as to any shore line within the present city limits (Exhibit "B" Appendix)

II

It is shown by the first U. S. Coast Survey map, made in 1859 (Exhibit "A" Appendix) that very little if any change in the coast line had taken place by natural accretion since 1850. The next U. S. Coast Survey Map is 1872 (Appendix "C") showing little if any change in the low tide line. This map shows the early part of Long Beach. It should be noticed that the first Coast Survey Map, in 1859, referred to the submerged water area east of Point Fermin as the "Pacific Ocean" as indeed it was and is. This submerged water area east of Point Fermin has been referred to as the Pacific Ocean by the Supreme Court of the United States.

Borax Consolidated Co. v. Los Angeles, 296 U. S. 10, at page 22.

It seems clear that all offshore submerged lands within Long Beach are submerged lands under the Pacific Ocean. The U. S. Coast Survey Map of 1872 called it the Pacific Ocean also.

It is true that since *U. S. v. California*, 1947, the United States has constructed breakwaters extending easterly from Point Fermin about eight miles to form a calm area to anchor Navy ships in. However, it is urged these breakwaters do not change the nature of the submerged lands into lands of inland waters as

claimed by the State of California; neither have the breakwaters changed the actual low tide line along the coast of the Pacific Ocean.

It is also true that the mouth of the San Gabriel River has been changed and moved by man easterly, so that it now enters the Pacific Ocean at the east side of Long Beach (Appendix "B") and its old course straightened and now called the Los Angeles River. (Appendix "B")

It would seem the most simple and fair method of establishing low water mark, low tide line, or coast line would be for this Court to decide as a matter of law, and as a guide line for other courts, that the coast line as established by the earliest U. S. Coast Survey Map is the correct line. That any artificial changes or man-made buildings, piers, wharfs, harbors, bays or breakwaters be disregarded.

The Coast Survey Maps were made at an early time by disinterested persons and are in most cases accurate and true; but should be subject to evidence in proper courts.

QUESTION NO. II

What Kind of Title Did Long Beach, California, Receive to Offshore Submerged Lands, Under the Submerged Lands Act?

This is an important question to all cities and states holding title to submerged lands under the Submerged Lands Act. This question of law has not been passed upon by the Supreme Court of the United States. It is respectfully urged that it should be without undue delay, so that the law and titles be clarified and set-

tled. It would seem clear that each and every city and state given land under the Submerged Lands Act would receive the same kind of title to submerged lands and the same rights to use the income therefrom.

At all times prior to May 22, 1953, the effective date of the Submerged Lands Act, the United States had title to or paramount rights in all offshore submerged lands below low tide line outside of inland waters.

United States v. California, 332 U. S. 19;
United States v. Louisiana, 339 U. S. 699;
United States v. Texas, 339 U. S. 707.

The Supreme Court of the United States has held the Submerged Lands Act a valid enactment; and within the Constitutional power of Congress, *State of Alabama v. Texas*, 347 U. S. 272, the Court pointing out that under Article IV, Section 3, Clause 2, of the United States Constitution, Congress has power to dispose of any property of the United States.

California claims the Submerged Lands Act is not a new grant of title to the state or city, but at most only confirms the title in the state to lands which it already owned; and confirmed the conveyances of title to the City of Long Beach by the State.

We find no constitutional power authorizing Congress to "confirm" a conveyance by a state, to a city, of lands owned by the United States. If the Submerged Lands Act does in fact only confirm the State title and conveyance, as the State claims, and if Congress has no constitutional power to confirm a state conveyance, then it follows the Submerged Lands

Act would be unconstitutional. However, the Submerged Lands Act has been held constitutional, so it had to be a new grant of land by the United States to Long Beach, California.

The latest case by the Supreme Court of the United States is, *United States v. Louisiana,* (1960) 363 U. S. 1, reaffirming the constitutionality of the Submerged Lands Act, and on page 6 note 38, the Court says:

> "Except as *granted* by Congress, the States do not own the land beneath the marginal sea."

In this latest case the Court used the word *grant* time and again. It is clear that the Court has treated the Submerged Lands Act as a new grant to the states or cities, and properly so.

Since this Court has held that prior to the Submerged Lands Act . . . The State of California has no title thereto or property interest therein . . . *U. S. v. California,* 332 U. S. 804-806, it is urged this Court should decide and clarify just what kind of a title passed to Long Beach, California, to the offshore submerged lands within its borders; and for what purposes the income can be used by the city.

This Court has not, so far as has been found, decided or announced the guide lines, of just what kind of title was given the states, cities or grantees, under the terms of the Submerged Lands Act; and has not decided what the income from the lands can be used for. There are many different claims and views in regard to the offshore submerged lands and the proper use of the income therefrom.

First: The claim of the State of California is that

income from submerged lands along the coast can properly be used by the State for any purpose; but that the City of Long Beach, California, must use its income for harbor purposes, commerce, navigation and fishing, under the control of the State.

Second: No known public position has been taken by the United States on the proper uses of income received from lands granted to the states, or others under the Submerged Lands Act.

Third: There are many public officials, but no actual cases, who claim the income from oil and gas should be used for harbor purposes, commerce, navigation and fisheries. The State of California contends that Long Beach must pay the State of California eighty-five percent of all oil money and all dry gas funds, and must use the fifteen percent left to the city for commerce, harbor, navigation and fishing (no other city in California has to pay the state any sum).

Fourth: The citizens and taxpayers of Long Beach claim that Long Beach was granted a new title, in fee, to all offshore submerged lands within the city limits under the express terms of the Submerged Lands Act. That the income from oil and gas can be used by the City of Long Beach for any municipal purpose; and that the State of California is powerless to attach any trust uses on the lands or income therefrom by legislation, court decree, or otherwise. That all funds impounded by stipulation by the United States and the City of Long Beach between the year 1945 and the year 1955, amounting to over $111,000,000.00, which were later paid to and turned over to the City of Long Beach under Section 3, (b)

(2) Title II of the Submerged Lands Act, are exclusive funds of the taxpayers and citizens and cannot be legally paid to the State. These impounded funds were released to, paid to, and turned over to the city by the United States, without trust or restrictions on the use thereof.

LONG BEACH HOLDS LANDS IN FEE SIMPLE

In 1911 the State of California conveyed to Long Beach, by Stats. 1911, p. 1034, amended by Cal. Stats. 1925, p. 35; Stats. 1935, p. 793, (quoted in entirety in Appendix) all tide and submerged lands within the city limits. No provisions were made that income from the lands was held in trust or any restrictions on the uses of such income was mentioned or required. It was held by the Supreme Court of California, in the case of *Marshall v. City of Long Beach*, (1938) 11 Cal. 2d 609, 82 Pac. 2d 362, at p. 364 (1), that the State intended to and did grant whatever rights it had to Long Beach; that the grant was in fee simple and included the oil and gas rights therein.

The Submerged Lands Act (67 Stats. 29, 1953, Title II, Section 3[a]) declares that:

> (1) Title to and ownership of lands beneath navigable waters within the boundaries of the respective States, and the natural resources within such lands and waters and . . .(2) the right and power to manage, administer, lease, develop and use the said lands and natural resources all in accordance with applicable state law be, and they are hereby, subject to the provisions hereof, recognized, confirmed, established and vested in and assigned to the respective States *or* the persons who were on June 5, 1950, entitled thereto under

> the *law* of the respective States in which the land is located, and the respective grantees, lessees or successors in interest thereof;" (Emphasis added)

The word "person" is defined in Title I, Sec. 2 (h) of the Act as including Municipal Corporations, hence the City of Long Beach is a person under the Act.

The title of the City of Long Beach to the submerged lands within its boundaries, was obtained by it from the United States under the above-quoted Submerged Lands Act. Said Act vested title directly from the United States to the City of Long Beach.

The party who is to take title under said Act is defined in the Act as being the state *or* the person entitled thereto under state law. There can be no doubt that Long Beach was entitled to the lands under state law of California on June 5, 1950, by Statute (Stats. 1935, p. 793) and court decision.

> *Marshall v. City of Long Beach*, 11 Cal. 2d 609, 82 Pac. 2d 362.

The words "established," "vested in" and "assigned to" are granting words and they had the effect of granting a new title to the submerged lands from the United States to the City of Long Beach, California, to lands within its borders.

Since neither the State of California nor the City of Long Beach had title to or property interests in the offshore submerged lands, prior to the Submerged Lands Act, *United States v. California*, 332 U. S. 804-806, the effect of said Act was to establish a new title in Long Beach.

QUESTION NO. III

Is the State of California Powerless to Take the Lands or Funds From Long Beach; or Impose Trusts On Use of the Funds?

It is clear that offshore submerged lands within its borders were granted to Long Beach, California, because the United States, owned such lands and had legal power to convey them.

Alabama v. Texas, 347 U. S. 272.

The actual important question is:

Does the State of California have legal power to take the lands or funds from Long Beach; or impose trusts on the use of City funds received from lands given to the City by the United States?

Such a question would be considered preposterous and unthinkable except the State of California claims such powers and has lately taken eighty-five percent (85%) of the oil and gas revenues for state general uses (not commerce, navigation and fisheries). The State of California claims title to and full control over all offshore submerged lands within Long Beach, with the right to dictate to Long Beach how the other fifteen percent can be used by the city.

Judge Story in *Dartmouth College v. Woodward*, 4 Wheat. 518, 4 L. Ed. 629, held that cities could accept and hold land for municipal uses the same as a private party, and such lands cannot be taken from the city by the state. Hence, since early times the courts have held that property of a city cannot be taken by the state. A late case which sustains this rule of law is, *Lightfoot v. Alabama*, (1960) 364 U. S. 339.

While this late case does not involve any property rights of a city, it does hold that states do not have unlimited power over cities. The California courts hold the same.

Gorgan v. San Francisco, 18 Cal. 590, at 615. Also, Kent, I Com. 3 vol. 275.

Under the California Constitution, a freeholder city, such as Long Beach, is exempt from legislative control as to municipal affairs, Const. Art. XI, Sec. 6.

Eastlick v. City of Los Angeles, 29 Cal. 2d 661 at 665, 177 Pac. 2d 558; 170 A.L.R. 225 and cases cited.

Since the terms of the Submerged Lands Act did not specify what the submerged lands, or funds, were to be used for by the City of Long Beach, and did not place any trust upon the lands or funds, we must concede they were granted by the United States for municipal affairs. It follows that the State of California is powerless to take the lands or funds; or establish a trust on the funds. The State has no right or power to take any part of the funds.

Board, et al v. Lucas, 93 U. S. 108, at p. 115.

Surely it will not be contended the State can take oil and gas income from park lands of the city which were donated by private parties to the city. It is urged the State is just as powerless to take the lands or funds given to Long Beach by the United States.

It is also urged that the taking of submerged lands located in Long Beach, or the funds, by the State of California without just compensation, is taking property and property rights of the taxpayers of Long

Beach in violation of due process of law as is guaranteed by the United States Constitution.

CONCLUSION

In conclusion, it is respectfully urged:

1. The ordinary low water mark, or low tide line, within Long Beach be decided and fixed at the coast line as shown by the Coast Survey Maps of 1859 and 1872, plus any natural change before May 22, 1953, the effective date of the Submerged Lands Act. That all lands seaward of such low tide line are submerged lands under the Pacific Ocean, outside of inland waters; and are not tidelands.

2. That Long Beach was granted all offshore submerged lands below low tide line, extending seawards into the Pacific Ocean three miles within the city boundaries. That the title to such lands was a fee simple title without trusts or restrictions on the use of the lands or income received therefrom.

3. That the State of California is powerless to take any of the submerged lands within Long Beach from the city or taxpayers, and has no legal power or right to take any income from such lands or place any trusts or control on any such lands or funds.

Respectfully submitted,

CARL WHITSON

APPENDIXES

U.S.

COAST SURVEY

A.D. BACHE Superintendent

Section X.

MAP

OF A PART OF THE COAST OF

CALIFORNIA

FROM

POINT FERMIN

EASTWARD TO

SAN GABRIEL RIVER

SURVEYED BY W.M. JOHNSON Sub-Assist.

1859.

Scale 1:80,000

Register No. 692

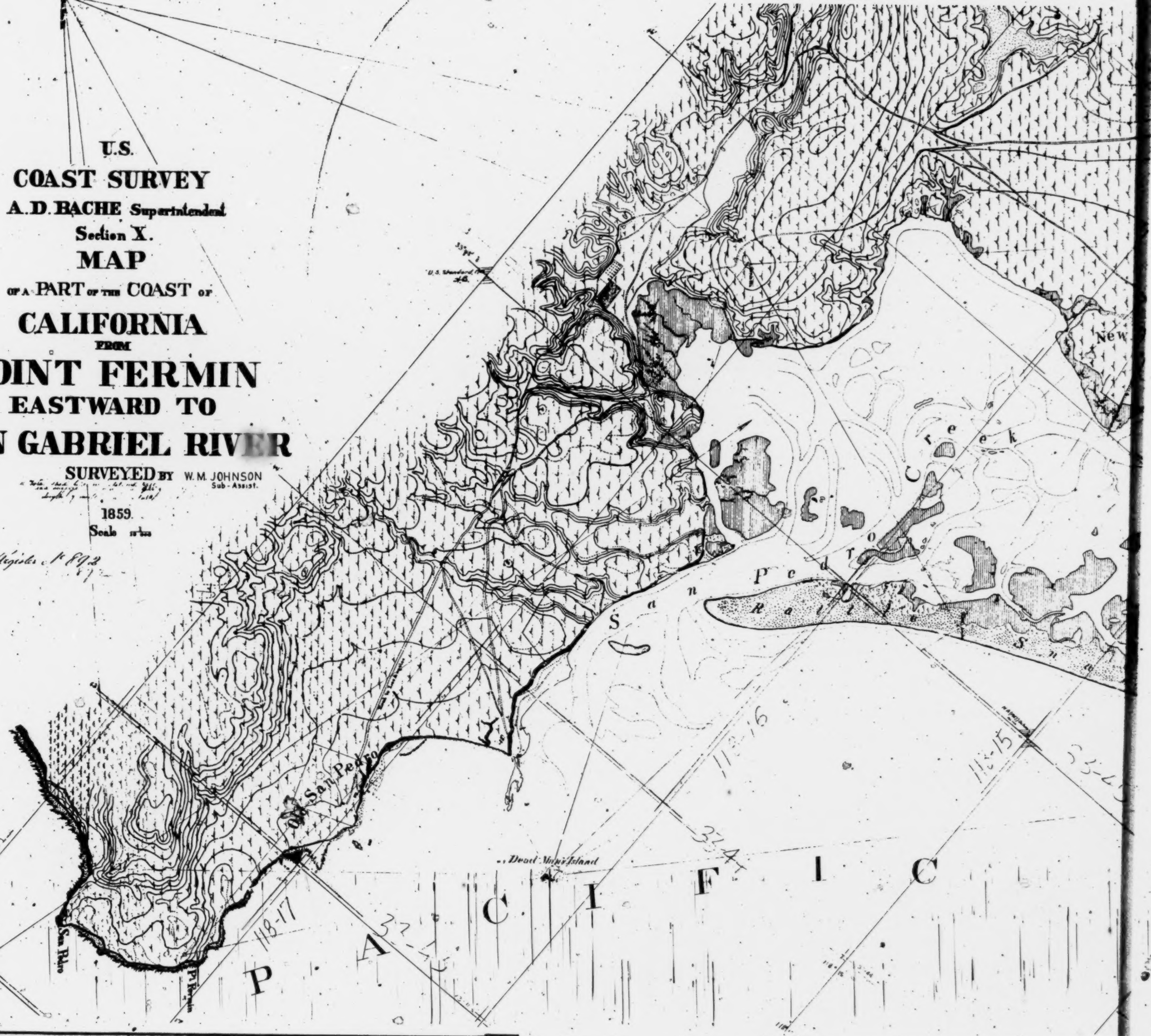


EXHIBIT "A"

New San Pedro

Creek

San Pedro

Island

San Gabriel River

PACIFIC OCEAN

EXHIBIT "B"

N

* NIETO HACIENDA

LOS ANGELES RIVER

LONG BEACH

LONG BEACH BOUNDRY LINE 1923

BLUFF LINE

LOW TIDE LINE

SAN GABRIEL RIVER

LONG BEACH BOUNDRY LINE

3 MILES

3 MILES

PACIFIC OCEAN

MAP INDICATING APPROX. LOW TIDE LINE IN 1850

U. S. DEPARTMENT OF COMMERCE

Washington, January 28 19 64

I hereby certify that the annexed is a true signed photographic copy of the original topographic survey T-1283 made in 1872

by the Coast and Geodetic Survey

Lorne G. Taylor
Chief, Nautical Chart Division
Office of Cartography, C&GS
(Official title)

I hereby certify that Lorne G. Taylor

whose name is subscribed to the foregoing certificate, is now, and was at the time of signing, Chief, Nautical Chart Division, Office of Cartography, Coast and Geodetic Survey

of the Department and to whom full faith and credit should be given his certificate as such.

In witness whereof, I have hereunto subscribed my name, and caused the seal of the Department of Commerce to be affixed this twenty-eighth day of January one thousand nine hundred and sixty-four.

For the Secretary of Commerce:

J. L. Mangrum
Executive Officer

A N G E D E F

WILMINGTON

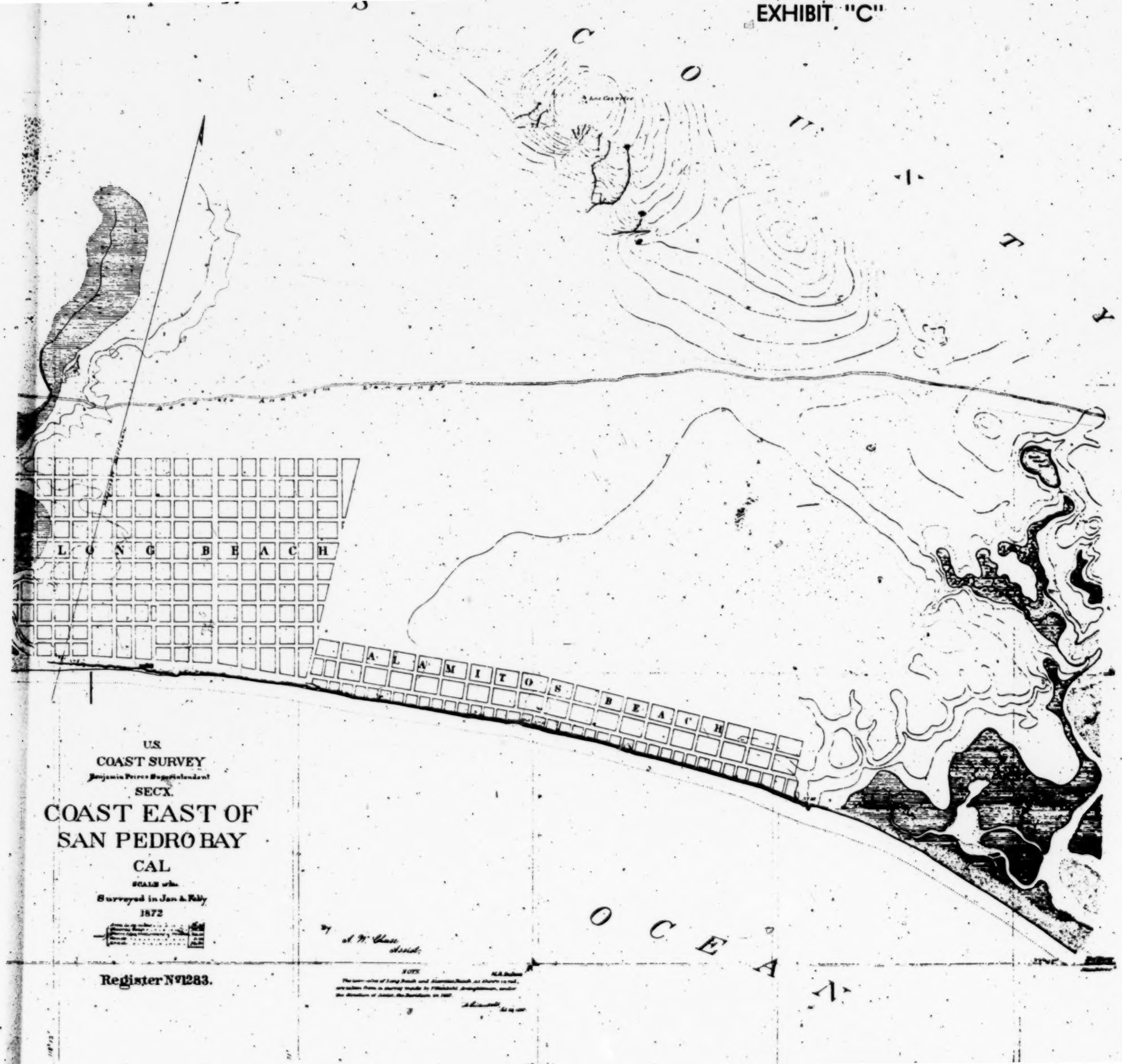
L O N G B E

P A C I F I C

U.S.
COAST SURVEY
Benjamin Peirce Superintendent
SECX.
COAST EAST OF
SAN PEDRO BAY
CAL
SCALE 1/80,000
Surveyed in Jan & Feb
1872

Register No 1283.

EXHIBIT "C"



U.S.
COAST SURVEY
Benjamin Peirce Superintendent
SECX.

COAST EAST OF SAN PEDRO BAY

CAL

SCALE 1/80.

Surveyed in Jan & July
1872

Register No 1283.

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APPENDIX A-1

CHAPTER 676

An Act Granting to the City of Long Beach the Tide Lands and Submerged Lands of the State of California Within the Boundaries of the Said City.

[Approved May 1, 1911.]

The people of the State of California, Represented in Senate and Assembly, Do Enact as Follows:

SECTION 1. There is hereby granted to the City of Long Beach, a municipal corporation of the State of California, and to its successors, all the right, title and interest of the State of California, held by said state by virtue of its sovereignty, in and to all the tide lands and submerged lands, whether filled or unfilled, within the present boundaries of said city, and situated below the line of mean high tide of the Pacific ocean, or of any harbor, estuary, bay or inlet within said boundaries, to be forever held by said city, and by its successors, in trust for the uses and purposes, and upon the express conditions following, to-wit:

(a) That said lands shall be used by said city and by its successors, solely for the establishment, improvement and conduct of a harbor, and for the construction, maintenance and operation thereon of wharves, docks, piers, slips, quays, and other utilities, structures and appliances necessary or convenient for the promotion and accommodation of commerce and navigation, and said city, or its successors, shall not, at any time, grant, convey, give or alien said lands, or any part thereof, to any individual, firm or corporation for any

purpose whatsoever; *provided*, that said city, or its successors, may grant franchises thereon, for limited periods, for wharves and other public uses and purposes, and may lease said lands, or any part thereof for limited periods, for purposes consistent with the trusts upon which said lands are held by the State of California and with the requirements of commerce or navigation at said harbor;

(b) That said harbor shall be improved by said city without expense to the state, and shall always remain a public harbor for all purposes of commerce and navigation, and the State of California shall have, at all times, the right to use, without charge, all wharves, docks, piers, slips, quays and other improvements constructed on said lands, or any part thereof, for any vessel or other water craft, or railroad, owned or operated by the State of California;

(c) That in the management, conduct or operation of said harbor, or of any of the utilities, structures or appliances mentioned in paragraph (a), no discrimination in rates, tolls, or charges, or in facilities, for any use or service in connection therewith shall ever be made, authorized or permitted by said city or by its successors;

Reserving, however, in the people of the State of California the absolute right to fish in the waters of said harbor, with the right of convenient access to said waters over said lands for said purpose.

APPENDIX A-2

CHAPTER 102

An act granting certain tidelands and submerged lands of the State of California to the City of Long Beach upon certain trusts and conditions.

[Approved by the Governor April 28, 1925.]

The people of the State of California do enact as follows:

SECTION 1. There is hereby granted to the City of Long Beach, a municipal corporation of the State of California, and to its successors, all of the right, title and interest of the State of California, held by said state by virtue of its sovereignty, in and to all of the tidelands and submerged lands, whether filled or unfilled, bordering upon, under and situated below the mean high tide line of the Pacific ocean, or of any harbor, estuary, bay or inlet, which are within the corporate limits of said city, to be forever held by said city, and by its successors, in trust for the uses and purposes and upon the express conditions following, to-wit:

(a) That none of said lands shall be used or devoted to any purposes other than public park, parkway, highway, playground, the establishment, improvement and conduct of a harbor and the construction, maintenance and operation thereon of wharves, docks, piers, slips, quays and other utilities, structures and appliances necessary or convenient for the promotion and accommodation of commerce and navigation; and said city, or its successors, shall not, at any time, grant,

convey, give or alien said lands, or any part thereof, to any individual, firm or corporation for any purpose whatsover; *provided, however*, that nothing herein contained shall be so construed as to prevent the granting or use of easements, franchises or leases for limited periods, or rights of way in, under, over or across said tidelands or submerged lands for power, telephone, telegraph or cable lines or landings, sewage disposal conduits, wharves and other public uses and purposes consistent with the trusts upon which said lands are held.

(b) That said lands devoted to the conduct of a harbor shall be improved by said city without expense to the state and such harbor shall always remain a public harbor for all purposes of commerce and navigation, and the State of California shall have, at all times, the right to use, without charge, all wharves, docks, piers, slips, quays and other improvements constructed on said lands, or any part thereof, for any vessel or other water craft, or railroad, owned or operated by the State of California.

(c) That in the management, conduct or operation of said harbor, or of any of the utilities, structures or appliances mentioned in paragraph (a), no discrimination in rates, tolls or charges, or in facilities for any use or service in connection therewith shall ever be made, authorized or permitted by said city or by its successors.

(d) The absolute right to fish in the waters of the Pacific ocean over said tidelands and submerged lands, with the right of convenient access to said waters over said lands for said purpose is hereby expressly reserved to the people of the State of California.

Statutes of 1935

Chapter 158

An act to amend section 1 of an act entitled "An act granting certain tidelands and submerged lands of the State of California to the City of Long Beach upon certain trusts and conditions," approved April 28, 1925, relating to the use of such tidelands and submerged lands.

[Approved by the Governor May 7, 1935. In effect September 15, 1935.]

The people of the State of California do enact as follows:

Section 1. Section 1 of the act cited in the title hereof, is hereby amended to read as follows:

Section 1. There is hereby granted to the City of Long Beach, a municipal corporation of the State of California, and to its successors, all of the right, title and interest of the State of California, held by said State by virtue of its sovereignty, in and to all of the tidelands and submerged lands, whether filled or unfilled, bordering upon, under and situated below the mean high tide line of the Pacific Ocean, or of any harbor, estuary, bay or inlet, which are within the corporate limits of said city, to be forever held by said city, and by its successors, in trust for the uses and purposes and upon the express conditions following, to-wit:

(a) That none of said lands shall be used or devoted to any purposes other than public park, parkway, highway, playground, the establishment, improve-

ment and conduct of a harbor and the construction, maintenance and operation thereof of wharves, docks, piers, slips, quays and other utilities, structures and appliances necessary or convenient for the promotion and accommodation of commerce and navigation; and said city, or its successors, shall not, at any time, grant, convey, give or alien said lands, or any part thereof, to any individual, firm or corporation for any purpose whatsoever; provided, however, that nothing herein contained shall be so construed as to prevent the granting or use of easements, franchises or leases for limited periods, or rights of way in, under over or across said tidelands or submerged lands for power, telephone, telegraph or cable lines or landings, sewage disposal conduits wharves and other public uses and purposes consistent with the trusts upon which said lands are held, or the leasing or use of such tidelands or submerged lands for limited periods for the construction, maintenance, and operation of nonprofit benevolent and charitable institutions organized and conducted for the promotion of the moral and social welfare of seamen, naval officers and enlisted men, and other persons engaged in and about the harbor and commerce, fishery, and navigation.

(b) That said lands devoted to the conduct of a harbor shall be improved by said city without expense to the State and such harbor shall always remain a public harbor for all purposes of commerce and navigation, and the State of California shall have, at all times, the right to use, without charge, all wharves, docks, piers, slips, quays and other improvements constructed on said lands, or any part thereof, for any vessel or other water craft, or railroad, owned or operated by the State of California.

(c) That in the management, conduct, or operation of said harbor, or any of the utilities, structures or appliances mentioned in paragraph (a), no discrimination in rates, tolls or charges, or in facilities for any use or service in connection therewith shall ever be made, authorized or permitted by said city or by its successors.

(d) The absolute right to fish in the waters of the Pacific Ocean over said tidelands and submerged lands, with the right of convenient access to said waters over said lands for said purpose is hereby expressly reserved to the people of the State of California.